Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER TIMOTHY BAST, Individually and as Personal Representative of the Estate of Rhonda Rae Fleming Bast; and DOUGLAS GLENN BAST, a Minor Child,
Petitioners,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 502(a) of ERISA authorizes a civil action to "recover benefits" or "to obtain other appropriate equitable relief." Under what circumstances may a court acting under this provision award monetary relief?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceeding before the Ninth Circuit Court of Appeals.

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Petitioners Roger Timothy Bast and Douglas Glenn Bast respectfully pray that this Court grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on June 2, 1998 and amended on August 3, 1998.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 150 F.3d 1003 (1998), and is set out at pp. 1a-21a of the Appendix. The order of the court of appeals denying the petition for rehearing, which is not officially reported, is set out at pp. 22a-23a of the Appendix. The order of the district court, which is not officially reported, is set out at pp. 24a-25a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1998, and amended on August 3, 1998. The court of appeals denied a timely petition for rehearing on April 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001, *et seq.*, provides in pertinent part as follows.

> **Sec. 1132. Civil enforcement**
> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought –
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce

any provisions of this subchapter or the terms of the plan; . . .

Sec. 1104. Fiduciary duties
(a) Prudent man standa. d of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .

STATEMENT OF THE CASE

This is another case in which the improper denial of medical benefits under an ERISA regulated health plan resulted in the death of a covered employee.

The decedent, Rhonda Bast, was an employee of the Cole National Corporation, which provided its employees with major medical benefits through respondent Prudential. In December of 1990, Rhonda Bast was diagnosed with breast cancer. In August 1991, following surgery and a diagnosis of a secondary malignancy in the left lung, Ms. Bast's oncologist recommended high dose chemotherapy and an autologous bone marrow transplant ("ABMT").

The procedure was to have occurred at the Fred Hutchinson Cancer Research Center ("Fred Hutchinson"). Two years earlier Prudential had reached a written agreement with Fred Hutchinson governing the fees that would be charged for this specific procedure and acknowledging that it was no longer experimental in nature.

As required by her benefit plan, Ms. Bast requested that Prudential preauthorize the ABMT treatment prescribed by her doctors. All parties, including Prudential, were aware that this procedure had to be performed quickly as the cancer was aggressive. But in September of 1991, Prudential nonetheless refused to grant preauthorization. The company insisted, despite its prior agreement with Fred Hutchinson, that the ABMT procedure was "experimental" and hence not covered by the Basts' benefit plan.

While urging Prudential to reconsider its position, the Basts spent approximately $10,000 of their own funds to pay for the necessary preparation for the ABMT procedure, including the harvesting of Ms. Bast's bone marrow for later use. However, they did not have sufficient funds – approximately $200,000 -- to pay for the ABMT procedure itself.

On December 31, 1991, Prudential formally denied coverage. Ms. Bast retained counsel, who brought to Prudential's attention its own 1989 agreement with Fred Hutchinson and contended that it required coverage for the ABMT Ms. Bast needed. Finally, on February 28, 1992, a full five months after Ms. Bast first sought preauthorization, Prudential acknowledged that the ABMT procedure was covered and agreed to fund it.

That five-month delay was literally fatal. When Ms. Bast returned to the hospital for further tests in preparation for the ABMT, doctors discovered that the cancer had metastasized and spread to her brain. This disqualified her from receiving the ABMT. Her health declined rapidly, and she died in January 1993.

Petitioners, Ms. Bast's husband and young son, commenced this action on January 10, 1996, in the United States District Court

for the Western District of Washington. Petitioners alleged, *inter alia*, that Prudential's repeated refusal to cover the ABMT procedure was a violation of both the benefit plan itself and of its fiduciary duty of care under ERISA. The remedies sought included appropriate equitable relief.

On March 13, 1997, the district court granted summary judgment in favor of Prudential and dismissed the Basts' claims. Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes awards of "equitable relief" to redress violations of ERISA or of a benefit plan. The district judge reasoned, however, that any possible monetary relief that might be awarded to petitioners would under Ninth Circuit precedent constitute damages rather than "equitable" relief.

The Ninth Circuit affirmed. Relying on prior decisions in that circuit, the panel held that the only monetary remedy permitted under the "equitable relief" clause of section 502(a) is disgorgement of ill-gotten gains. The court acknowledged that respondent's alleged violations had indeed resulted in unjust enrichment of considerable magnitude (equal to the cost of the procedure) and a tragic loss of life, but insisted that it was not the kind of unjust enrichment for which ERISA section 502(a)(3) provided any remedy.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The enactment in 1974 of the Employee Retirement Income Security Act largely federalized the regulation of employee benefit programs, including medical, life insurance, and pension benefits. Although the substantive reforms embodied in ERISA significantly restrained abuses in the operations of those plans, the statute generally preempted existing state remedies. In most instances the compensatory and punitive damages formerly available under state contract and tort law cannot be obtained in an action under ERISA. *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). Instead, plaintiffs seeking monetary relief are limited under section 502(a) to the recovery of benefits and to "appropriate equitable relief."

The scope of the "equitable relief" available under section 502(a) controls not only the remedies available to aggrieved employees seeking redress from employers or benefit plans or officials, but also the remedies which employers or benefit plans can obtain against employees[1] or from each other[2].

Litigation by the Secretary of Labor under 29 U.S.C. § 1132(a)(5) constitutes a significant portion of the cases in which disputes about the availability of equitable remedies under section 502(a) have arisen. The Secretary has been subject, in many circumstances, to the same restrictions imposed on private plaintiffs. *See, e.g., Reich v. Rowe*, 20 F.3d 25, 29-31 (1st Cir. 1994); *Reich v. Continental Casualty Co.*, 33 F.3d 754 (7th Cir. 1994), *cert. denied* 513 U.S. 1152 (1995); *Reich v. Stangl*, 73 F.3d 1027 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996); *Herman v. South Carolina*

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[1] *See, e.g., Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990).

[2] *See, e.g., Luby v. Teamsters Health, Welfare & Pen. Tr. Funds*, 944 F.2d 1176 (3d Cir. 1991).

Nat. Bank, 140 F.3d 1413, 1422 (11th Cir. 1998) *cert. denied*, __ U.S. __, 119 S. Ct. 1030 (1999); *Reich v. Polera Bldg. Corp.*, 1996 WL 67172 (S.D.N.Y. 1996); *Herman v. Wolfe*, 1998 WL 42356 (N.D. Ill. 1998).

This Court has already noted the considerable ambiguity of the statutory language of section 502(a); "the distinction between 'equitable' and 'remedial' relief is artless . . . . " *Mertens v. Hewitt Associates*, 508 U.S. 248 at 259 n.8. Indeed, this Court has been sharply divided about the proper methodology for distinguishing between "legal" and "equitable" claims generally. *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1989).

This Court's decisions in *Mertens* and *Russell* noted the existence, but did not clarify the scope, of the authorization in section 502(a) of "equitable relief."[3] In the absence of guidance from this Court, the lower courts have been perplexed and divided about the meaning of this inartful but enormously important provision. "The courts are in some disarray on the circumstances in which the doctrine of unjust enrichment may be invoked with respect to claims arising under ERISA." *Member Services Life Ins. Co. v. American Nat'l Bank & Trust Co. of Sapulpa*, 130 F.3d 950, 957 (10th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1843 (1998). "Like many issues that involve ERISA, the federal courts are divided over the creation of a federal common law of unjust enrichment." *Provident Life & Accident Insurance Co. v. Waller*, 906 F.2d 985, 992 (4th Cir. 1990).

Thus, where an employer has mistakenly made excessive contributions to a benefit plan, the "circuits have split" on whether

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[3] One recent commentator observed that "the issue as to what constitutes 'appropriate equitable relief' remains, notwithstanding the fact that the Supreme Court has attempted to settle this conflict." Comment, *Varity' Corp. v. Howe in the Wake of Mertens v. Hewitt Associates: Did the Supreme Court Impermissibly Authorize a Damages Award under ERISA Section 502(a)(3)(B)?*, 102 Dick. L. Rev. 411, 415 n.46 (1998).

and when the employer can obtain restitution of those funds. *Plucinski v. I.A.M. Nat. Pension Fund*, 875 F.2d 1052, 1053 (3rd Cir. 1989); *see also, Dime Coal Co., Inc. v. Combs*, 796 F.2d 394, 398 (11th Cir. 1986) (rejecting reasoning of Ninth Circuit decision).

Similarly, the circuits are divided about whether a plan which has provided medical benefits to an accident victim can recover those funds after the victim obtains an even larger settlement from the tortfeasor; the Eleventh Circuit has criticized the Ninth Circuit's disapproval of such claims as "based on an unduly narrow reading" of *Mertens*. *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347, 1353 n.5 (11th Cir. 1998). In holding that awards of back pay are "equitable" relief under section 502(a), the Sixth Circuit has acknowledged that the Eleventh Circuit rule is to the contrary. *Schwartz v. Gregori*, 45 F.3d 1017, 1023 n.5 (6th Cir. 1994) *cert. denied* 516 U.S. 819 (1995).

The division among the lower courts derives in part from a dispute about the significance of this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). The Ninth Circuit has repeatedly, but mistakenly, insisted that no monetary relief was involved in that case. "The equitable remedy provided by the Court in *Varity* . . . was reinstatement, not money damages" (App. 19a); "[t]he plaintiffs in *Varity* were seeking reinstatement . . . ." *McLeod v. Oregon Lithoprint, Inc.*, 102 F.3d 376, 379 (9th Cir. 1996).

In fact, however, the lower courts in *Varity* had awarded the plaintiffs almost $700,000. In contrast to the Ninth Circuit, the Third Circuit has attached considerable significance to this Court's affirmance of the order in *Varity*, stressing that "the Supreme Court in *Varity* . . . held that in some circumstances beneficiaries could make personal recoveries from an ERISA fiduciary . . . ." *Ream v. Frey*, 107 F.3d 147, 152 (3rd Cir. 1997); *cf., In re Unisys Corp.*, 57 F.3d 1255, 1269 (3rd Cir. 1995) *cert. denied*, 517 U.S. 1103 (1996) (relying on Eighth Circuit decision in *Varity* awarding monetary relief). "[I]n reasoning later upheld by the Supreme Court in *Varity*, the Eighth Circuit held that restitution included paying benefits to retirees who wrongfully were lured away from the solvent benefit

plans." *Jackson v. Truck Drivers' Union Local 42*, 933 F. Supp. 1124, 1139 (D. Mass. 1996).

The confusion among the lower courts stems in part from the fact that this Court's opinion in *Varity* does not spell out exactly what became of the dispute within the Eighth Circuit as to the propriety of the monetary award in that case. A review of the certiorari petition and briefs in *Varity* makes clear that the defendants there did not ask this Court to review the remedy that had been ordered, but raised issues only regarding the merits of the claim and the existence of a private right of action. At the oral argument in *Varity*, members of the Court indeed raised questions as to whether the relief in that case was permissible under section 502(a), but counsel for both sides agreed that that issue was not before the Court.

> "QUESTION. So one of the keys to your case is that you contend here you're getting equitable relief?
>
> [COUNSEL FOR RESPONDENTS]: Correct.
>
> QUESTION: And that's what distinguishes *Russell*?
>
> [COUNSEL FOR RESPONDENTS]: That's right, and we can only obtain equitable relief under 502(a)(3). We ...
>
> QUESTION: And we have no issue before us here as the case comes to us about whether what you did recover fits that description?
>
> [COUNSEL FOR RESPONDENTS]: Correct. They have not brought that to you. We ...
>
> QUESTION: It looks a lot like damages.
>
> [COUNSEL FOR RESPONDENTS]: Ju[dge] Hanson at the circuit level in the dissent had some

> thoughts along that line and wanted it sent back to have a better record developed on that."[4]
>
> * * *
>
> "[COUNSEL FOR PETITIONERS]: I'd like to return to Justice O'Connor's observation earlier, when you said that it looked a lot like damages. It's perfectly true that we have not put at issue here, and it's not before the Court whether this is equitable relief or not."[5]

The lower courts have not incorporated the perspective afforded by the oral argument in *Varity* into their analysis of this issue.

The differences among the lower courts do not stem from circumstance-specific, ad hoc decisions about which remedies are and are not "equitable." Rather, the lower courts have fashioned general but quite different standards for delineating the distinction between equitable and legal remedies under §502(a). As we explain below, the specific standards adopted and applied by the Ninth Circuit differ substantially from those utilized in a number of other circuits.

II. THE NINTH CIRCUIT ONLY PERMITS MONETARY AWARDS UNDER THE "EQUITABLE RELIEF" CLAUSE OF SECTION 502 WHERE NECESSARY TO COMPEL DISGORGEMENT OF "ILL-GOTTEN GAINS."

This case marks the seventh occasion in recent years in which the Ninth Circuit has held that ERISA provides no meaningful relief to an aggrieved plaintiff. In another recent opinion, the court of appeals acknowledged that *Varity* indicated Congress could not have intended that result, but paradoxically insisted that it was required by this Court's earlier decision in *Mertens*.

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[4] Oral Argument, No. 94-1471, 1995 WL 671565 p. 13.

[5] *Id.* at 19.

> In *Varity* . . . the Supreme Court states: "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." . . . Yet that is exactly, according to the Supreme Court interpretation of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), what Congress has done. *See Mertens* . . . .

Farr v. U.S. West Communications, Inc., 151 F.3d 908, 917 (9th Cir. 1998) (Hawkins, J., concurring). Individual Ninth Circuit judges have on several occasions argued without success that the circuit's precedents are mistaken, and that the court should reconsider them *en banc*. *Id.* at 917 (Noonan, J., concurring) ("The decision is compelled by Ninth Circuit precedent but I believe we should ask the circuit to take the case *en banc* and distinguish *Mertens*"); *Pacificare Inc. v. Martin*, 34 F.3d 834, 838 (9th Cir. 1994) (Norris, J., dissenting).

The Ninth Circuit has created and relentlessly imposes three requirements on parties seeking equitable restitution under ERISA section 502(a)(3). A plaintiff must establish: (A) the "receipt" of funds (only the acquisition of funds, not savings, will suffice); (B) that the funds were "ill-gotten;" and (C) that defendant enjoyed a "gain" as a result.

The instant case is perhaps the most extreme application of these limitations. The Basts alleged that Prudential's five-month refusal to fund urgently needed cancer treatment was a violation of the benefit plan and of Prudential's fiduciary obligations under ERISA. The court of appeals acknowledged "the seemingly needless loss of life that resulted." (App. 21a). It is undisputed that the delay saved some $200,000, the cost of the treatment which Ms. Bast was too ill to receive by the spring of 1992. But the Ninth Circuit insisted that ERISA nonetheless left petitioners "without a viable remedy." (App. 18a).

The court of appeals explained that this result was required by Ninth Circuit precedent, which limits equitable monetary relief to the return of funds improperly taken from the plaintiff. In the instant case, the $200,000 profit was made, not by taking that sum *from* Ms. Bast, but by a five-month refusal, which proved to be both permanent and fatal, to pay *to* her the amount to which she was entitled under her benefit plan. In the Ninth Circuit that distinction is of critical importance. The panel acknowledged that "[i]mposition of constructive trust is an appropriate remedy in some cases." (App. 20a) (citing *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997) and *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988)). However, in those cases,

> we imposed a constructive trust upon the employers' "ill-gotten" profits from breach of their fiduciary duties. In both cases, an identifiable portion of the beneficiaries' pension plans had been improperly *taken* from them.
>
> In the present case, . . . a constructive trust is sought to force Prudential to disgorge the amount of money *it saved* by not paying for the ABMT procedure. This amount of money is not an "ill-*gotten* profit" in the same sense as the money *taken from* the pension plans in *Waller* and *Murdock*. While Prudential may have been unjustly enriched, it did not *take* money from the Plan.

(App. 20a) (Emphasis added). The panel concluded that "because no funds were *taken* from the Plan, there are no 'ill-*gotten*' profits to *return*." (App. 21a) (Emphasis added). Any monetary relief not involving "ill-gotten profits," the court insisted, would be "the equivalent of money damages." (App. 20a).

The Ninth Circuit approved retention of similar illicit profits in *MacPherson v. Employers Health Insurance*, 168 F.3d 500 (table), 1999 WL 51508 (9th Cir. 1999). The benefit plan in that case had

also repeatedly refused to pay for the cancer treatment at issue. The patient in MacPherson was more fortunate than Ms. Bast; she was a Swedish dual-national, and had sufficient personal funds to pay for the procedure in Sweden, where it cost her only $50,000, far less than what it would have cost in the United States[6]. When MacPherson sued the plan under ERISA, it finally agreed to pay for the cheaper Swedish treatment, but refused to pay for the additional costs MacPherson had incurred traveling to and remaining in Sweden during the treatment. Despite the fact that the plan's initial alleged violation had netted it a very substantial profit, the court of appeals declined "to fashion a new equitable remedy." 1999 WL 51508 at *2. Equitable restitution, it explained, was for restoration of "ill-gotten" assets; the insurance company, however, had not taken any money from the MacPhersons. Thus they could not recover even the amount of the defendant's illicit profits equal to the out-of-pocket expenditures that the MacPhersons had incurred in going to Sweden to reduce the cost of the treatment.

> [T]o the extent that Christina MacPherson's travel and relocation expenses are sought as part of an alleged breach of a fiduciary duty owed to her under § 1132(a)(3), these costs cannot be construed as a claim for appropriate equitable relief authorized by ERISA.

1999 WL 51508 at *2.

Similarly, in *Durham v. Health Net*, 108 F.3d 337 (table) (9th Cir.), 1997 WL 66558, *cert. denied*, __ U.S. __, 118 S. Ct. 51 (1997), the defendant medical plan had refused to authorize a bone marrow transplant for the plaintiff cancer victim. When changes in her medical condition made that treatment impracticable, Durham sued the plan for unjust enrichment, seeking disgorgement of the large profit which that plan too had made by refusing the treatment.

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[6] The details of these events are set out in the briefs for the parties filed in the Ninth Circuit.

The court of appeals denied relief, insisting that there was "no authority" for a court award stripping the medical plan of that illicit gain. 1997 WL 66558 at *1. *See McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376 (9th Cir. 1996) (section 502(a) does not provide remedy for plaintiff who was improperly denied information about her eligibility for cancer insurance.)

As the Secretary of Labor correctly stressed in her brief in the court of appeals, these decisions create a substantial financial incentive for health plans in the Ninth Circuit to improperly refuse to preauthorize expensive treatments. If the untreated patient dies as a result, or if a change in his or her medical conditions makes the treatment impracticable, the plan stands to turn a healthy profit, confident that it can retain the funds unlawfully denied and that it will face no liability for any injury or death it may have caused. The particular inequity of these precedents is that the perverse incentives which they create do not apply where a patient is wealthy enough to use his own funds to pay for the treatment; in such a case section 502(a)(1)(B) expressly authorizes the patient to sue for reimbursement. If Ms. Bast had been a rich woman, she would have received the lifesaving treatment and the Ninth Circuit would have ordered respondent to reimburse her; employees of modest means, on the other hand, are likely to die untreated while their health plans turn a tidy profit.

In *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997), on the other hand, the Ninth Circuit applied this narrow interpretation of section 502(a) to the detriment of a benefit plan. FMC Medical had paid Owens more than $50,000 for medical bills incurred as a result of an automobile accident; under the terms of the plan, Owens was obligated to refund to FMC any compensation he received from the party responsible for the accident. Owens later settled that automobile claim for $100,000, but refused to reimburse FMC, resulting in a double recovery for Owens. The Ninth Circuit denied FMC's claim for relief under section 502(a), insisting that an order directing Owens to return the $50,000 would not be an "equitable" remedy within the meaning of section 502(a):

> [W]hat FMC seeks is not restitution. Restitution is . . . the return of "ill-gotten" assets or profits taken from a plan. Owens did not obtain FMC's funds by any fraud or wrongdoing. Owens obtained the funds pursuant to the Plans, which obligated the funds to be paid to him under the circumstances of this case. FMC's claim is for reimbursement of money . . . . Such monetary relief is not available under section 1132(a)(3).

122 F.3d at 1261 (citations omitted).

Similarly, in *Pacificare Inc. v. Martin*, 34 F.3d 834 (9th Cir. 1994), the Ninth Circuit refused to permit an HMO which had paid the defendant over $1 million in medical benefits to obtain any reimbursement from a later multi-million dollar settlement of the defendant's tort claims. *See, Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 915 (9th Cir. 1998) (although employer violated its fiduciary duty by using misleading information to induce plaintiffs to retire, "no remedy is available to Plaintiffs under ERISA.")

III. THE DECISIONS OF THE NINTH CIRCUIT ARE IN CONFLICT WITH NUMEROUS COURTS OF APPEALS

In the Ninth Circuit, the Secretary of Labor, who is charged with the central role in administering ERISA, maintained that the panel decision was inconsistent with the purposes of ERISA and with the decisions of this Court: Noting that the panel opinion distinguished between illicitly obtained funds and illicit savings, the government argued that

> an overwhelming body of authority shows that this was an incorrect distinction for the court to have drawn.
>
> * * *
>
> The United States Supreme Court . . . has recognized that "savings" are a form of unjust

> enrichment under the common law of trusts. The Court considered this issue in applying trust law to the computation of restitutionary awards in patent infringement cases. *Tilghman v. Proctor*, 125 U.S. 136, 148 (1888) . . . . If the infringer "produced a definite saving in the cost of manufacture, he must account to the patentee for the cost so saved." *Tilghman*, 125 U.S. at 146 . . .
>
> * * *
>
> If [the panel's] decision stands, it is not simply a matter of the Basts being denied a remedy; rather, Prudential is being permitted to profit from an alleged breach of fiduciary duty. Indeed, other fiduciaries in the Ninth Circuit would be given thereby a financial incentive to breach their own fiduciary duties. This result is tolerated neither under the trust law nor under the law of restitution. It also cannot be tolerated under ERISA.
>
> This is precisely the kind of case the Supreme Court had in mind in *Varity; i.e.*, a case which compels an "appropriate equitable remedy" which otherwise would be unavailable under ERISA.

Brief of *Amicus Curiae* Alexis W. Herman, Secretary of the United States Department of Labor, No. 97-35429 (9th Cir.), pp. 6-9 (citations omitted).

The Ninth Circuit's insistence that disgorgement of illicit savings is never an equitable remedy is clearly inconsistent with this Court's subsequent decision in *City of Monterey v. Del Monte Dunes at Monterey*, __ U.S. __, 119 S. Ct. 1624, 1639 (1999).

> Just compensation . . . differs from equitable restitution and other monetary remedies available in

> equity, for in determining just compensation, "the question is what has the owner *lost*, not what has the taker *gained*." *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725 (1910).

(Emphasis added). In the instant case, the $200,000 cost of the ABMT at issue represents the illicit profit obtained by delaying approval of Ms. Bast's treatment. It is not a measure of the far greater harm done to petitioners, Ms. Bast's husband and child, by her untimely and unnecessary death.

The tragedy is that the language of ERISA itself does not preclude the remedy sought by petitioners. Rather, in the Ninth Circuit, relief is barred by the circuit's insistence that plaintiffs (including the Secretary of Labor) satisfy the three judicially-created requirements mentioned in Section II above: (A) the "receipt" of funds; (B) that the funds were "ill-gotten;" and (C) "gain" by the defendant. The circuits differ widely in their assessment of the correctness of each of these three requirements.

A. The "Receipt" Requirement.

Six circuits reject the Ninth Circuit rule that only ill-gotten gains, but not illicit savings, can be reached by an equitable remedy.

The Ninth Circuit rule applied in this case would clearly preclude the very award that was upheld by the Eighth Circuit opinion in *Howe v. Varity Corp.* 36 F.3d 746 (8th Cir. 1994). The defendants in *Varity* had not wrongfully acquired any funds; rather, just as in the instant case, they had successfully connived to save a large sum that should have been paid to the plaintiffs. The particular scheme in *Varity* involved the use of fraudulent representations to induce employees to give up their rights under a benefits plan and transfer to a new company that was essentially bankrupt. 36 F.3d 748-750. Although the plaintiffs in *Varity* were no longer plan members, the Eighth Circuit upheld an award of almost $700,000, equal to the benefits that would have been paid to them had they not

been induced to leave the financially sound plan.

> The relief awarded includes payments of money that plaintiffs would have received if they had remained members of the [solvent] Plan, but we do not think these payments can properly be characterized as "damages," and thus unavailable under Section 502(a)(3). Rather, we view the payments as restitution. Equity will treat that as done which ought to have been done. Or, to put it in words that fit the present case more precisely, equity will disregard that which ought not to have been done. Plaintiffs should never have been lured away from [the solvent plan] into the shaky [new plan]. The payments we are ordering are exactly what plaintiffs would have gotten if they had remained at [the solvent plan.]

36 F.3d at 756. In the Ninth Circuit, on the other hand, the scheme perpetrated in *Varity* would be largely successful, since the employer would have been able to keep the hundreds of thousands of dollars of illegally avoided benefit obligations.

In *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3d Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996), the employer terminated its medical benefits plan after having assured employees that they would receive benefits for life. The Third Circuit, relying on the Eighth Circuit decision in *Howe v. Varity Corp.*, upheld an award of "restitutionary reimbursement for back benefits" as "equitable relief available under section 502(a)(3)." 57 F.3d at 1269. There, as in the instant case, the funds which Unisys was compelled to disgorge had not been acquired, illicitly or otherwise, from the employees. Rather, they had been held back improperly.

In the Sixth Circuit, *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir.) *cert. denied*, 516 U.S. 819 (1995), held that an award of back pay under ERISA was equitable in nature, reasoning that the

award represented funds that the employer would have paid to the plaintiff but for the employer's illegal conduct. In *Bair v. General Motors Corp.*, 895 F.2d 1094, 1097 (6th Cir. 1990), a plaintiff who had been denied participation in a special retirement program sued for the payments he would have received had he been included in the program; the Sixth Circuit held that such an action "is one in equity, not at law." 895 F.2d at 1097. Like this case, both *Schwartz* and *Bair* involved funds that been in the possession of the defendant all along, rather than being wrongfully acquired in some manner.

Other circuits hold similarly. For example, the Fifth Circuit has ruled that equitable relief includes any action seeking "restitution of money allegedly wrongly *held* by the defendants", *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995) (emphasis added). How the defendants came into possession of that money is irrelevant to that circuit's formulation.

In *Anweiler v. American Elec. Power Service Corp.*, 3 F.3d 986, 993 (7th Cir. 1993), the Seventh Circuit held that under *Mertens* the beneficiary of an employee's life insurance policy could bring an action to impose a constructive trust on the policy proceeds, where the insurance company had sought to retain the funds to compensate it for excess funds earlier received by the decedent.

In the instant case the Ninth Circuit acknowledged that unjust enrichment had occurred, but insisted that equitable relief often would not be available to undo such enrichment. The District of Columbia Circuit, on the other hand, holds that under ERISA "[g]enerally, restitution is an appropriate remedy where there is unjust enrichment", defining unjust enrichment in a manner unrelated to how the enrichment came about. *Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 495 (D.C. Cir. 1998).

B. The "*Ill*-Gotten" Requirement

The other courts of appeals have overwhelmingly rejected the rule in the Ninth Circuit that only funds acquired *illicitly* can be the

subject of an order of restitution to prevent unjust enrichment.

The issue has arisen most often in the same circumstances in which the Ninth Circuit rejected restitution in *FMC Medical Plan*, in actions by a benefit plan to recover from a beneficiary funds which otherwise result in a double recovery by that beneficiary. Four circuits permit that remedy, which the Ninth Circuit in *FMC Medical Plan* held is impermissible under section 502(a). *Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 495 (D.C. Cir. 1998) (section 503(a)(3) authorizes "restitution against third parties who wrongly *or mistakenly* receive money to which the plan is entitled") (emphasis added); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993 (4th Cir.), *cert. denied* 498 U.S. 982 (1990) (avoidance of such double recovery fits "the archetypal unjust enrichment scenario"); *Harris Trust and Savings Bank v. Provident Life and Accident Ins. Co.*, 57 F.3d 608 (7th Cir. 1995) (such a remedy is "equitable relief" within the meaning of ERISA section 502 and *Mertens*); *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347, 1352-53 n. 5 (11th Cir. 1998) (such a remedy is "equitable relief" under section 502 and Supreme Court decision in *Varity*). The Eleventh Circuit decision in *Blue Cross* expressly criticized the Ninth Circuit rule to the contrary in *FMC Medical Plan*. 138 F.3d at 1353 n. 5.

In addition, three circuits have rejected in other contexts any requirement that the acquisition of disputed funds have been illicit. *Kwatcher v. Mass. Service Emp. Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989) (restitution includes an action for refund of payments "mistakenly made"); *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176, 1186 (3rd Cir. 1991) (authorizing "equitable remedy to recover mistaken payments"); *Jamail, Inc. v. Carpenters Dist. Council*, 954 F.2d 299, 304-05 (5th Cir. 1992) (equitable remedy of restitution available for refund of payment made by "mistake").

C. The "Gain" Requirement

The Ninth Circuit's insistence that "equitable relief" is limited to correcting unjust enrichment -- however defined -- involves

a more complex inter-circuit conflict. The Second, Seventh and Eleventh circuits also apply that Ninth Circuit rule; on the other hand, the Third, Fourth and Sixth circuits have rejected any such limitation.

The Seventh Circuit in *Health Cost Controls v. Skinner*, 44 F.3d 535, 538 n.7 (7th Cir. 1995) insists, in language similar to that of the Ninth Circuit in the instant case, that under *Mertens*, "[r]estitution and constructive trust are remedies available only when one party has been unjustly enriched at another's expense." The Eleventh Circuit holds that a claim for back pay is a legal rather than an equitable remedy because "[r]estitution is generally defined as an equitable remedy designed to cure unjust enrichment of the defendant." *Waldrop v. Southern Co. Services, Inc.*, 24 F.3d 152, 158 (11th Cir. 1994). In the Second Circuit, to receive restitution "a plaintiff must demonstrate that the defendant 'had wrongfully secured a benefit, or had passively received one which it would be unconscionable for him to retain.'" *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 22 (2d Cir. 1996).

On the other hand, the Sixth Circuit rule is that "[w]hile restitution generally is awarded to prevent unjust enrichment to the defendant, that is not required in every case." *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1994), *cert. denied* 516 U.S. 819 (1995). The Sixth Circuit in *Gregori* expressly noted that the Eleventh Circuit decision in *Waldrop* was to the contrary. 45 F.3d at 1022 n. 5. In *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235-36 (3rd Cir. 1994), the Third Circuit held that equitable monetary relief was available under section 502(a)(3) against an employer which had misrepresented the scope of the insurance being provided to its employees; the employer itself had received no direct benefit from the misrepresentation, which had induced the employee not to obtain from other sources coverage she thought the employer was providing. In *LeBlanc v. Cahill*, 153 F.3d 134, 153 (4th Cir. 1998), the Fourth Circuit held that under section 502(a), a defrauded Fund could obtain as an equitable remedy not only disgorgement of illicit profits but also monetary relief sufficient to restore the Fund "to the position it held before" the fraudulent acts.

CONCLUSION

Lives are at stake. The "inartful" language that Congress used when it substituted ERISA for the broader remedies previously available under state law has left the circuits in disarray. Given the jurisprudence developing in some circuits, ERISA administrators have a financial incentive to breach their fiduciary duties and deny urgent medical treatment until the patient is too sick to benefit from it. The Secretary of Labor has correctly warned that this "cannot be tolerated under ERISA."

For the above reasons, a writ of certiorari should be granted to review the decision of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 2, 1998]
[Amended August 3, 1998]

NO. 97-35429
DC No. CV-96-00057-Z

ROGER TIMOTHY BAST, individually and as Personal Representative for the ESTATE OF RHONDA RAE FLEMING BAST; DOUGLAS GLENN BAST, a minor child, *Plaintiffs-Appellants,*	)
v.	)
PRUDENTIAL INSURANCE COMPANY OF AMERICA, an insurance corporation, *Defendant- Appellee.*	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
May 7, 1998 - Seattle, Washington

Before David R. Thompson and A. Wallace Tashima, Circuit Court Judges and Tom Stagg, District Judge.*

Opinion by Judge Thompson

SUMMARY

Insurance/Health

The court of appeals affirmed a judgment of the district court. The court held that the lack of any remedy under the Employee Retirement Income Security Act (ERISA) does not require or permit the equitable remedies of restitution or imposition of a constructive trust to satisfy preempted state-law wrongful death damages claims against a health-plan insurer.

When Rhonda Bast was diagnosed with breast cancer, her doctor recommended that she undergo an autologous bone marrow transplant (ABMT) procedure and high-dose chemotherapy. The treatment center to which she was referred contacted appellee Prudential Insurance Company of America, the insurer-administrator of Rhonda's employee health plan, to get authorization for the ABMT. Prudential responded that the procedure was not covered because of its investigational and/or experimental nature.

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* Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

Prudential eventually changed its position on Rhonda's claim, concluding that the ABMT procedure was covered, and that Rhonda was eligible for benefits. However, Prudential's approval came too late: Rhonda's cancer had spread, disqualifying her for the ABMT procedure, and she died.

Rhonda's husband, appellant Roger Bast, and her son, Douglas Bast, sued Prudential, alleging state-law claims of breach of fiduciary duty, breach of contract, loss of consortium, emotional distress, breach of the duty of good faith and fair dealing, and violations of Washington's Consumer Protection Act and Insurance Code.

The district court granted summary judgment for Prudential, concluding that ERISA preempted the Basts' claims, and provided no remedy for Prudential's alleged bad-faith denial of benefits.

On appeal, the Basts contended that summary judgment was inappropriate because there was an issue of fact as to whether the plan was managed by an agency of the federal government: the Resolution Trust Company (RTC) was the receiver of a financial institution that owned a 28 percent interest in Rhonda's corporate employer. The Basts also asserted that their state statutory claims were not preempted because they came within ERISA's "savings clause."

Alternatively, the Basts contended that if ERISA provided no remedy, it should not preempt their state-law claims, which did. Finally the Basts claimed that they were entitled to the remedies of restitution or imposition of a constructive trust under ERISA's provision affording "appropriate equitable relief."

[1] ERISA exempts from preemption any plan that is established or maintained by the U.S. Government or its instrumentality. **[2]** The RTC's involvement did not convert the private benefit plan into a government benefit plan. The plan was established and paid for by a private entity for the benefit of its

employees. [3] The plan was not exempt from ERISA on that basis.

[4] A state-law cause of action is preempted ERISA if it "relates to" an employee benefit plan. A law relates to an employee benefit plan if it has a connection with or reference to such a plan. A state law may relate to a benefit plan even if the law is not specifically designed to affect such plans, or the effect is only indirect.

[5] In recent decisions, the Supreme Court has limited the scope of the "relate to" provision of ERISA. [6] In determining whether a state law relates to ERISA, a court must evaluate whether the state law "has a connection with or reference to" the employee benefit plans. To determine whether a state law has the forbidden connection, courts must look both to the objectives of ERISA as a guide to the scope of the state law that Congress understood would survive, as well as the nature of the effect of the state law on ERISA plans.

[7] ERISA preempts state common-law tort and contract causes of action asserting improper processing of a claim for benefits under an insured employee benefit plan. The provisions of ERISA set forth a comprehensive civil enforcement scheme that would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. [8] ERISA preempts a state-law wrongful death cause of action based on an insurance company's negligent administration of a claim [9] Washington courts have also recognized ERISA preemption in circumstances similar to the Basts'.

[10] However, ERISA has a savings clause. ERISA does not exempt any person from any law of any state that regulates insurance, banking, or securities. [11] The Washington Insurance Code establishes a duty for all insurance companies to act in good faith. [12] Washington's Consumer Protection Act prohibits unfair or deceptive business practices. [13] Notwithstanding ERISA's

savings clause, the Ninth Circuit has held that insurance bad faith claims are preempted by ERISA. [14] The Basts' claims arose out of Prudential's actions as the benefit plan administrator, not as an insurance company or insurance provider. Prudential's alleged breach of fiduciary duty was conduct covered by ERISA. The claims under the Washington Insurance Code and Consumer Protection Act were not exempt under ERISA's savings clause, and were covered by ERISA.

[15] ERISA's civil enforcement provision outlines the possible claims by a participant or beneficiary. They include an action to recover benefits due under the plan; an action for breach of fiduciary duties; and a suit to enjoin violations of ERISA or the plan, or to obtain other equitable relief. [16] Extracontractual, compensatory and punitive damages are not available.

[17] The Basts' ERISA claims were for loss of Rhonda's chance of survival, out-of-pocket costs, loss of income, loss of consortium, and emotional distress. These claims all sought extracontractual or compensatory damages that are not recoverable under ERISA. For those claims, ERISA provided no remedy. [18] ERISA preempts state-law claims even if the plaintiff is left without a remedy.

[19] ERISA provides that a participant or beneficiary may bring a civil action to obtain other "appropriate equitable relief" to redress violations of ERISA, or to enforce provisions of ERISA or the benefit plan. [20] The Supreme Court has held that "appropriate equitable relief" does not authorize suits for money damages for breach of fiduciary duty.

[21] Imposition of a constructive trust for breach of a fiduciary duty is an appropriate equitable remedy under ERISA in some cases. [22] However, in this case, a constructive trust did not fit the mold. A constructive trust was sought to force Prudential to disgorge the money it saved by not paying for the ABMT procedure. While Prudential may have been unjustly enriched, it did not take money from the plan. [23] Moreover, the proceeds of

such a trust could not be paid to the Basts because it would have been the equivalent of money damages. And because no funds were taken from the plan, there were no "ill-gotten" profits to return to the plan. A constructive trust was not an appropriate remedy under ERISA.

COUNSEL

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Jerry Spoonemore, Montgomery, Purdue, Blankinship and Austin, Seattle, Washington, for the defendant-appellee.

Jane Shapira, Northwest Women's Law Center, Seattle, Washington, for the amicus curiae.

ORDER

The mandate issued June 24, 1998 is recalled.

The opinion filed June 2, 1998 is amended as follows:

The paragraph at slip op. 5350 with the designation of headnote [5], which paragraph begins "ERISA's preemption clause", is deleted, and the following two paragraphs are inserted in its place:

> In more recent decisions, however, the Supreme Court has limited the scope of the "relate to " provision of ERISA. *See DeBuono v. NYSA-ILA Med. and Clinical Serv. Fund*, 117 S. Ct. 1747, 1751 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Courts must "go beyond the unhelpful text and the frustrating difficulty of defining its key term ["relate to"], and look instead to the objectives of the ERISA statute

as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656. *See also Operating Engineers Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 677 (9th Cir. 1998) ("Of late, the [Supreme] Court has come to recognize that ERISA preemption must have limits when it enters areas traditionally left to state regulation . . . ."); *Toumajian v. Frailey*, 135 F.3d 648, 653 n.3 (9th Cir. 1998) ("Recently, the scope of this broad 'relate to' preemption was markedly narrowed.")

In determining whether a state law relates ERISA, a court must evaluate whether the state law "has a connection with or reference to" employee benefit plans. *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129 (1992). "[T]o determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as the nature of the effect of the state law on ERISA plans." *California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 117 S. Ct. 832, 838 (1997) (citations omitted).

OPINION

THOMPSON, Circuit Judge:

Roger Timothy Bast, individually and as the personal representative of the estate of his late wife, Rhonda Rae Fleming Bast, and their minor son, Douglas Glenn Bast ("the Basts") appeal the district court's grant of summary judgment in favor of Prudential Insurance Company ("Prudential"). The Basts argue that Prudential acted in bad faith and breached its fiduciary duty to Rhonda Bast by delaying authorization for a potentially life-saving

medical procedure. The district court held that all of the Basts' state law claims were preempted by the Employee Retirement Income Security Act ("ERISA") and that ERISA provides no remedy for Prudential's alleged bad faith denial of benefits.

We have jurisdiction pursuant to 28 U.S.C.§ 1291 and we affirm. Although this case presents a tragic set of facts, the district court properly concluded that under existing law the Basts are left without a remedy.

I

BACKGROUND

Rhonda Bast was an employee of Cole National Corporation ("Cole"). Cole provided major medical benefits for its employees under the "Cole National Corporation Group Benefit Plan" (the "Plan"). Prudential acted as the administrator of this health insurance plan. Additionally, Prudential provided excess insurance coverage to Cole to cover benefits in excess of certain specified limits. During the relevant time period all of Rhonda Bast's benefits were paid for by Cole out of its general assets.

In December 1990, Rhonda Bast was diagnosed with breast cancer and she underwent a left modified radical mastectomy in January 1991. In August 1991, she was diagnosed with a secondary malignancy in her left lung. Her oncologist recommended that she undergo an autologous bone marrow transplant procedure ("ABMT") and high dose chemotherapy at the Fred Hutchinson Cancer Research Center ("the Center").

On September 9, 1991, the Center contacted Prudential to request pre-authorization for the withdrawal, processing and storage of Rhonda Bast's bone marrow. On September 13, Prudential informed the Center that the bone marrow procedure was not covered by the Plan. This was confirmed in a letter dated September 19th. However, on September 12th, Rhonda Bast, at her own expense, had her bone marrow harvested for processing and

storage.

On December 31, 1991, Prudential issued a complete denial of coverage for the ABMT procedure. The denial letter stated that the procedure was not covered because it appeared to be "investigational and/or experimental in nature." The Plan excluded coverage for procedures that were educational, experimental, or investigational in nature.

Rhonda Bast contacted an attorney who sent letters to Prudential on February 13 and 14, 1992. The February 13th letter stated that several other insurers had paid for the ABMT procedure and stated that Rhonda Bast "needs her bone marrow transplant in April [1992]. Without it she will most likely die." The February 14th letter provided a list of cases in which insurance companies had been required to pay for the ABMT procedure.

Rhonda Bast's claim was further reviewed by Prudential on February 28, 1992. On that date, Prudential's medical director informed Rhonda Bast's claim consultant that "while the protocol is clearly investigational, since it is a NCI [National Cancer Institute] sponsored trial, and according to the rules established in a recent GCLM [Group Claim Division Memorandum], it is eligible for benefits." On that same day, the claim consultant called the Center and advised it that the ABMT procedure and high dose chemotherapy would be covered under the Plan. Prudential also mailed a letter confirming the coverage, and in early March 1992, Prudential reimbursed the Basts for the costs of the harvesting and storage procedure.

Prudential's authorization of the ABMT came too late. In April 1992, Rhonda Bast underwent an MRI scan of her brain which showed that the cancer had metastasized to her brain. The spread of the cancer disqualified her from participating in the ABMT procedure. Her health declined steadily and she died in January 1993.

On January 10, 1996, Rhonda Bast's husband and minor son filed the complaint in this case against Prudential. The complaint alleged causes of action for breach of contract, loss of consortium, loss of income, emotional distress, breach of the duty of good faith and fair dealing, violation of the Washington Consumer Protection Act and the Washington Insurance Code, and ERISA.

Prudential filed an unsuccessful motion to dismiss, followed by an unsuccessful first motion for summary judgment. Subsequently, however, the district court granted Prudential's second summary judgment motion, holding that ERISA preempted the Basts' state law claims, and that they had no ERISA remedy. The district court dismissed the Basts' complaint with prejudice, and this appeal followed.

II

DISCUSSION

We review de novo a grant of summary judgment. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir.), *cert. denied*, 118 S. Ct. 559 (1997); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact for trial. *Forsyth*, 114 F.3d at 1474.

Whether ERISA preempts a plaintiff's state law claims is a question of law we review de novo. *Ward v. Management Analysis Co. Employee Disability Benefit Plan*, 135 F.3d 1276, 1279 (9th Cir. 1998); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993).

A. *Government Exemption*

[1] The Basts first argue that the district court improperly granted summary judgment because there is an issue of fact as to whether the Plan was managed by an agency of the government.

ERISA exempts from preemption any plan that is established or maintained by the U.S. government, a state government or by any agency or instrumentality of the government. 29 U.S.C. § 1002(32); 29 U.S.C. § 1003(b)(1).

The Basts argue that during the relevant time period, the Plan was "maintained" by the Resolution Trust Company ("RTC"), which is arguably an agency of the U.S. government. They ground this argument on the fact that from 1992 to 1995, the RTC was the receiver for a failed savings and loan association which owned shares in Cole. The S&L's shares represented about 28% of Cole's stock. The RTC was allowed to elect three members to the seven member board of directors of Cole. The RTC, however, exercised no control over Cole or the Plan, and no government employee served as a fiduciary under the Plan.

[2] The RTC's involvement with Cole did not convert Cole's private benefit plan into a government benefit plan. The Plan was established and paid for by Cole, a private entity, for the benefit of its employees. *Cf. Silvera v. The Mutual Life Ins. Co.*, 884 F.2d 423, 427 (9th Cir. 1989) (holding that where a governmental entity purchases a benefit plan on behalf of government employees and delegates the administration to a private insurer, the plan is a government plan exempt from ERISA); *and see McGraw v. Prudential Ins. Co.*, 137 F.3d 1253 (10th Cir. 1998) (holding that a public trust that exercised control over the beneficiary's employment did not change the benefit plan into a government plan because the trust did not establish the Plan or control it).

[3] Cole's employee benefit plan is not a government plan and is not exempt from ERISA on that basis. The issues then become whether ERISA preempts the Basts' state law claims, and if it does, whether it provides a remedy.

B. *ERISA Preemption*

[4] ERISA regulates employee benefit plans in order to promote the interests of employees and their beneficiaries. *Ward*, 135 F.3d at 1287. Under section 514(a), a state law cause of action is preempted by ERISA if it "relates to" an employee benefit plan. 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). "A law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983)). A state law may relate to a benefit plan even if the law "is not specifically designed to affect such plans, or the effect is only indirect." *Id.*

[5] In more recent decisions, however, the Supreme Court has limited the scope of the "relate to" provision of ERISA. *See DeBuono v. NYSA-ILA Med. and Clinical Serv. Fund*, 117 S. Ct. 1747, 1751 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Courts must "go beyond the unhelpful text and the frustrating difficulty of defining its key term ["relate to"], and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656. *See also Operating Engineers Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 677 (9th Cir. 1998) ("Of late, the [Supreme] Court has come to recognize that ERISA preemption must have limits when it enters areas traditionally left to state regulation . . . ."); *Toumajian v. Frailey*, 135 F.3d 648, 653 n.3 (9th Cir. 1998) ("Recently, the scope of this broad 'relate to' preemption was markedly narrowed.")

[6] In determining whether a state law relates to ERISA, a court must evaluate whether the state law "has a connection with or reference to" employee benefit plans. *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129 (1992). "[T]o determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to

the scope of the state law that Congress understood would survive,' as well as the nature of the effect of the state law on ERISA plans." *California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 117 S. Ct. 832, 838 (1997) (citations omitted).

[7] The Supreme Court has held that ERISA preempts state common law tort and contract causes of action asserting improper processing of a claim for benefits under an insured employee benefit plan. *Pilot Life*, 481 U.S. at 57. The detailed provisions of ERISA § 502(a) set forth a comprehensive civil enforcement scheme that "would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.* at 54.

Similarly, we have held that state law tort and contract claims as well as violations of a state insurance statute are preempted by ERISA. *Tingey*, 953 F.2d at 1131 (holding plaintiffs' causes of action for breach of contract, breach of the duty of good faith and fair dealing, intentional infliction of emotional distress, and violations of the Arizona Insurance Code were preempted by ERISA).

[8] In a factually similar case, we held that ERISA preempts a state law wrongful death cause of action based upon an insurance company's negligent administration of a claim. *Spain*, 11 F.3d at 132. "ERISA preempts Appellants' wrongful death action because the state law in its application directly 'relates to' the administration and disbursement of ERISA plan benefits." *Id. See also Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 494 (9th Cir. 1988) (holding that the plaintiffs' state common law causes of actions for breach of contract and breach of the duty of good faith and fair dealing, as well as a statutory cause of action for unfair insurance practices under the California Insurance Code were preempted by ERISA).

[9] Washington state courts have also recognized ERISA preemption in circumstances similar to the Basts'. The Washington Supreme Court has held that common law claims for negligence,

outrage, breach of contract, negligent misrepresentation and fraud which are based upon an interference with an attainment of benefits are preempted by ERISA. *Cutler v. Phillips Petroleum*, 124 Wash. 2d 749, 763, 881 P.2d 216 (1994); *Hepler v. CBS, Inc.*, 39 Wash. App. 838, 696 P.2d 596 (1985) (holding that ERISA preempts a plaintiff's claims for violation of the State Insurance Code and Consumer Protection Act).

[10] ERISA, however, has a savings clause. This clause states that ERISA does not exempt any person from "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. S 1144(b)(2)(A). The Basts argue that their state law claims for violations of the Washington Insurance Code and the Washington Consumer Protection Act are not preempted by ERISA. They assert that these two state statutes fall within ERISA's "savings clause."

[11] The Washington Insurance Code establishes a statutory duty for all insurance companies to act in good faith. It provides:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.

Wash. Rev. Code § 48.01.030 (1997).

[12] Washington's Consumer Protection Act prohibits unfair or deceptive business practices. Wash. Rev. Code § 19.86 (1997).

[13] The Basts recognize that, notwithstanding ERISA's savings clause, we have held that insurance bad faith claims are preempted by ERISA. They argue, however, that they are not suing the Plan, they are suing Prudential as an insurance company doing business in Washington. They assert that ERISA does not preempt relationships "where a plan operates just like any other commercial

entity, for instance the relationship between the plan and its own employees, or the plan and its insurers or creditors . . . ." *General Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1522 (9th Cir. 1993). They contend, therefore, that whether Prudential is administering a benefit plan or not, it is still bound by the good faith obligations imposed upon an insurance company by Washington's Insurance Code and Consumer Protection Act.

[14] These arguments fail to persuade us that the Basts' claims are exempted by ERISA's savings clause. The Basts' claims against Prudential arise out of Prudential's actions as the benefit plan administrator, not as an insurance company or insurance provider. "[T]he key issue is whether the parties' relationships are ERISA-governed relationships." *Geweke Ford v. St. Joseph's Omni Preferred Care Inc.*, 130 F.3d 1355, 1358 (9th Cir. 1997) (citing *Castonguay*, 984 F.2d at 1522). Prudential's alleged breach of fiduciary duty while administering the benefit plan is conduct covered by ERISA.

The Basts' claims under the Washington Insurance Code and Washington Consumer Protection Act are not exempt under ERISA's savings clause. Accordingly, these claims are covered by ERISA. If the Basts are to recover, they must do so under ERISA.

C. *ERISA Claims*

[15] ERISA's civil enforcement provision outlines the possible claims by a participant or beneficiary. 29 U.S.C. § 1132, ERISA S 502(a). They include: (1) an action to recover benefits due under the plan, ERISA § 502(a)(1)(B); (2) an action for breach of fiduciary duties, ERISA § 502(a)(2); and (3) a suit to enjoin violations of ERISA or the Plan, or to obtain other equitable relief, ERISA § 502(a)(3).

[16] Extracontractual, compensatory and punitive damages are not available under ERISA. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) (holding that ERISA § 502(a)(3) does not allow for

extracontractual damages, including damages for emotional distress).

[17] The Basts' ERISA claims are for loss of Rhonda Bast's chance of survival, for out of pocket costs, loss of income, loss of consortium, and emotional distress. These claims all seek extracontractual or compensatory damages which are not recoverable under ERISA. Thus, for these claims, ERISA provides no remedy.

The Basts argue that if ERISA provides no remedy, ERISA should not preempt their state causes of action which do provide a remedy. They make two related arguments: (1) they should not be left without a remedy for Prudential's allegedly wrongful conduct, and (2) they are entitled to recover under

ERISA's equitable relief provision, section 502(a)(3).

We addressed these two arguments in *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1823 (1997). In that case, Pamela McLeod claimed that her employer's ERISA plan administrator breached its fiduciary duty by failing to notify her that she was eligible for coverage under a cancer insurance policy. *Id.* at 377. McLeod sought a judgment for the amount of benefits she would have been paid if coverage had been provided under the cancer policy, and for compensatory damages for emotional distress. *Id.* We held that the term "equitable relief" in ERISA § 502(a)(3) does not allow for the recovery of compensatory damages. *Id.* at 378. We stated that McLeod did not seek an injunction, mandamus, or restitution, and damages are not "equitable relief." *Id.*

> The basis of [McLeod's] complaint is that the fiduciaries failed to notify her in a timely manner of her right to elect cancer coverage. This is in essence a negligence claim, for which she seeks to be made whole through an award of money damages equal in amount to the benefits that she

would have been paid and compensation for her emotional distress.

Id. Even though McLeod asserted that "without monetary relief, she [was] left with no adequate remedy," *id.* at 378, we concluded that ERISA's civil enforcement scheme was exclusive, ERISA preempted the state law claims, and damages were unavailable.

[18] In a lawsuit nearly identical to the present lawsuit, the Tenth Circuit held that ERISA preempts state law claims even if the plaintiff is left without a remedy. *Cannon v. Group Health Serv.*, 77 F.3d 1270 (10th Cir.), *cert. denied*, 117 S. Ct. 66 (1996). In *Cannon*, Phyllis Cannon was diagnosed with leukemia and needed the ABMT procedure. The insurers administering her ERISA plan denied pre-authorization for the procedure because it was experimental. *Id.* at 1271. Cannon requested reconsideration, and the insurers eventually reversed their decision and agreed to authorize the ABMT. However, by the time the procedure was authorized, Cannon's window of opportunity for receiving the ABMT had passed and she died shortly thereafter. *Id.* Cannon's surviving spouse brought an action against the insurers alleging that they negligently or in bad faith had refused to authorize in a timely manner the ABMT procedure. The Tenth Circuit held that ERISA preempts state law claims even if there is no alternative remedy under ERISA. *Id.* at 1272. *Id.* Cannon's surviving spouse was left without a remedy.

The Fifth and Sixth Circuits have reached the same conclusion under equally tragic circumstances. "While we are not unmindful of the fact that our interpretation of the preemption clause leaves a gap in remedies within a statute intended to protect participants in employee benefit plans, . . the lack of an ERISA remedy does not affect a preemption analysis." *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir. 1992) (ERISA administrator denied a hospital stay for woman during the final weeks of a high-risk pregnancy and the fetus died); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 943 (6th Cir. 1995) (wrongful death) ("That ERISA does not provide the full range of

remedies available under state law in no way undermines ERISA preemption."); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991) ("Nor is it relevant to an analysis of the scope of federal preemption that appellants may be left without a remedy.").

Although forcing the Basts to assert their claims only under ERISA may leave them without a viable remedy, this is an unfortunate consequence of the compromise Congress made in drafting ERISA. *See Tolton*, 48 F.3d at 943 ("One consequence of ERISA preemption, therefore, is that plan beneficiaries or participants bringing certain types of state actions--such as wrongful death--may be left without a meaningful remedy.").

We agree with our sister circuits that ERISA preempts state law claims, even if the result is that a claimant, relegated to asserting a claim only under ERISA, is left without a remedy. The focus is on ERISA. If it does not provide a remedy, none exists. Here, the only possible remedy under ERISA is for equitable relief.[1]

D. *Equitable Relief*

[19] ERISA § 502(a)(3) provides that a participant or beneficiary may bring a civil action "to obtain other appropriate equitable relief" to redress violations of ERISA or to enforce provisions of ERISA or the benefit plan. 29 U.S.C. § 1132(a). The Basts argue they can obtain, under ERISA, the equitable remedy of restitution because that would be "other appropriate equitable relief."

The district court concluded that to grant restitution to the

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[1] There was a brief time when Rhonda Bast could have sought equitable relief under ERISA. She could have sought an injunction to compel Prudential to authorize the ABMT procedure when Prudential first denied coverage. *See* 29 U.SC § 1132(a)(1)(B)

Basts would be equivalent to awarding them money damages, and such an award would not be an equitable remedy. The court stated:

> [I]n this case, where the only conceivable remedy that I could foresee would be the cost of the procedure which the plaintiff was not given at a time when it would have hopefully provided some relief for her, is the same as really a legal recovery of cost . . .. I see no other possible theory of restitution that would be "appropriate" in the sense of it being different than a legal remedy.

We agree.

[20] The Supreme Court has held that the language "appropriate equitable relief" does not authorize suits for money damages for breach of fiduciary duty. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 -58 (1993)." `[E]quitable relief' in the form of the recovery of compensatory damages is not an available remedy under § 502(a)(3). " *McLeod*, 102 F.3d at 378.

The Basts rely heavily upon the Supreme Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). There, the Court held that ERISA participants or beneficiaries may bring an action for equitable relief for breach of fiduciary duties. *Id.* at 514-15. The Court concluded that section 502(a)(3) is a catchall provision designed to act as a "safety net" offering appropriate equitable relief for violations of ERISA where there is no other adequate remedy. *Id.* at 512. ERISA's basic purposes favor providing plaintiffs with a remedy. *Id.* "[I]t is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id.* at 513.

The equitable remedy provided by the Court in *Varity*, however, was reinstatement, not money damages. The *Varity* beneficiaries were tricked by an administrator into withdrawing from their benefit plan and forfeiting their benefits. The Court concluded that reinstatement was an appropriate equitable remedy.

Id. at 515.

The Northwest Women's Law Center ("Amicus") argues that we should impose a constructive trust as an equitable remedy in the amount which Prudential was unjustly enriched by denying coverage for the ABMT procedure. The Amicus contends that if insurance companies are not forced to disgorge the unjust enrichment that they gain by such bad faith denials, they will have no incentive to honor legitimate requests from their ERISA beneficiaries. To the contrary, the Amicus argues, insurance companies would be given an incentive to deny expensive treatments hoping that the beneficiary would not sue, or if she or her estate did, they would be left without a remedy.

[21] Imposition of a constructive trust for breach of a fiduciary duty is an appropriate equitable remedy under ERISA in some cases. *See FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997); *Waller v. Blue Cross*, 32 F.3d 1337 (9th Cir. 1994); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988). In both *Waller* and *Murdock*, we imposed a constructive trust upon the employers' "ill-gotten profits" from breach of their fiduciary duties. In both cases an identifiable portion of the beneficiaries' pension plans had been improperly taken from them.

[22] In the present case, however, a constructive trust does not fit the mold. Here, a constructive trust is sought to force Prudential to disgorge the amount of money it saved by not paying for the ABMT procedure. This amount of money is not an "ill-gotten profit" in the same sense as the money taken from the pension plans in *Waller* and *Murdock*. While Prudential may have been unjustly enriched, it did not take money from the Plan.

[23] Moreover, the Amicus is unclear as to what form a constructive trust would take. The Amicus suggests the trust could benefit the Plan or the Basts. Under *McLeod*, however, it is clear that the proceeds of such a trust could not be paid to the Basts because this would be the equivalent of money damages. *McLeod*,

102 F.3d at 378. And, because no funds were taken from the Plan, there are no "ill-gotten" profits to return to the Plan. We conclude that in this case a constructive trust is not an appropriate equitable remedy under ERISA § 502(a)(3). And there is no other remedy available.

III

CONCLUSION

We echo the words of Judge Porfilio of the Tenth Circuit: "Although moved by the tragic circumstances of this case and the seemingly needless loss of life that resulted, we conclude the law gives us no choice but to affirm." *Cannon*, 77 F.3d at 1271. The Basts' state law claims are preempted by ERISA, and ERISA provides no remedy. Unfortunately, without action by Congress, there is nothing we can do to help the Basts and others who may find themselves in this same unfortunate situation.

AFFIRMED.[2]

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[2] Prudential's motion requesting "terms" against the Basts for Prudential having to move to strike a document the Basis submitted as a "supplemental excerpt of record" is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-35429
DC# CV-96-00057-Z

ROGER TIMOTHY BAST, individually and as Personal Representative for the ESTATE OF RHONDA RAE FLEMING BAST; DOUGLAS GLENN BAST, a minor child, *Plaintiffs-Appellants,*	)
v.	)
PRUDENTIAL INSURANCE COMPANY OF AMERICA, an insurance corporation, *Defendant- Appellee.*	)

ORDER

Before: THOMPSON and TASHIMA, Circuit Judges and STAGG, District Judge.[1]

[1] Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

The panel of judges noted above voted unanimously to deny the petition for rehearing. Judges Thompson and Tashima voted to deny the petition for rehearing en banc, and Judge Stagg recommended denial.

The full court was advised of the petition for rehearing en banc, and no judge of the court requested a vote on that petition. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
Western District of Washington

[Filed March 13, 1997]

CASE NUMBER: C96-57Z

ROGER BAST	)
	)
v.	)
	)
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA	)
	)

JUDGMENT IN A CIVIL CASE

U **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

U **Decision by Court.** This action came to trial or hearing before the Court. the issues have been tried or heard and a decision has been rendered.

IT IS ORDER AND ADJUDGED THAT

The court grants the defense motion for summary judgment.

This action is dismissed with prejudice on all counts.

BRUCE RIFKIN, Clerk

By /s/_____
Casey Condon
Deputy Clerk